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Nos. 79-905 and 79-916

In the Supreme Court of the United States

OCTOBER TERM, 1979

FLOYD JOSIAH, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

LOUIS ANTONIO RIVERA, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20530

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Petitioners contend that the Double Jeopardy Clause bars their retrial following a mistrial granted on their motions.

1. An information filed in the United States District Court for the Virgin Islands charged petitioners and two co-defendants with first-degree murder, kidnapping, conspiracy, and the use of a non-registered firearm in the

commission of a crime of violence in violation of V.I. Code Ann. tit. 14, §§ 921, 922(a)(1), 1051 551(1), 2253(a) and 2254 (1964 and 1978 Cum. Supp.).[1] Before trial petitioner Rivera moved for a separate trial, alleging that he would be denied a fair trial by testimony concerning admissions of his co-defendants that would be inadmissible as to him under *Bruton* v. *United States*, 391 U.S. 123 (1968) (79-916 Pet. Apps. C, D). At a hearing on this motion, the prosecutor advised the court that the government witnesses who were to testify about admissions of a defendant had been instructed not to mention the other defendants' names (79-916 Pet. App. D). The motion for a separate trial was denied.

During trial, a government witness testified about a conversation he had with co-defendant Elmo Barnes (79-905 Pet. 4-5):

"Q. What was the nature of that conversation?

A. * * * I asked him why did he run when he saw both detectives Carlos Rodriguez and Farrelly passing by, and he stated because they are looking for him pertaining to the question of the Luis Golden killing, so I asked him if he was involved in the killing and he said I iced Golden because he messed up some money and a CB radio and some marijuana that belongs to him and the three other defendants.

Q. That he iced him?

A. Yes, sir."

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[1]Another co-defendant also filed a petition for a writ of certiorari; we have waived response to that petition, *Juan Rios* v. *Government of the Virgin Islands*, No. 79-5734. After his mid-trial severence motion was granted, the remaining co-defendant, Elmo Barnes, pleaded guilty to one count of second-degree murder.

Petitioner Rivera immediately objected to this testimony and both petitioners moved for a mistrial based on *Bruton* v. *United States*, *supra*. The court denied the motion at that time (79905 Pet. 7), and the prosecutor was permitted to continue questioning the witness. Thereafter, the witness said he heard co-defendant Rios tell Barnes that the latter should not kill Golden (79-916 Pet. 5-6). At this point, co-defendant Barnes objected and moved for a mistrial or, in the alternative, for a severance (*id.* at 6). The court then reconsidered petitioners' mistrial motions and ruled that a *Bruton* problem that could not be corrected by a cautionary instruction was created by the witness' reference to the "other three defendants" (*id.* at 7-8). In response to an inquiry by the court, petitioners stated that they had moved for mistrials (*id.* at 8). The court ruled that the trial of petitioners and co-defendant Rios would be terminated but that the trial would continue against co-defendant Barnes, for whom no *Bruton* problem existed (*id.* at 9).[2] In characterizing its ruling the court stated (*ibid.*):

> I could call it a mistrial or a severance, it doesn't really matter. I would rather say severance, myself.

2. Before retrial, petitioners and Rios moved to dismiss the charges on double jeopardy grounds. The district court denied the motions in a written order finding them to be "frivolous, absolutely without merit in fact or in law and that they were being made by the attorneys for the purpose of delay only" (79-716 Pet. App. A-2). The court of appeals affirmed (79-716 Pet. App. B). Retrial is currently scheduled to commence on February 25, 1980.

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[2]Barnes then pleaded guilty to one count of second-degree murder.

3. Petitioners' contention that the Double Jeopardy Clause bars their retrial lacks merit. The record shows that both petitioners specifically requested a mistrial (79-916 Pet. 2, 8). When such a motion is made, there is ordinarily no bar to the reprosecution of a defendant since he has retained "primary control over the course to be followed." *United States* v. *Dinitz*, 424 U.S. 600, 607-610 (1976). See *United States* v. *Scott*, 437 U.S. 82, 93 (1978). As this Court stated in *Dinitz*: "[t]he distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause." 424 U.S. at 608. Where a mistrial is requested or consented to by the defendant, it is not necessary that the mistrial be the product of "manifest necessity" *See Arizona* v. *Washington*, 434 U.S. 497 (1978); *Illinois* v. *Somerville*, 410 U.S. 458 (1973).

Petitioner Josiah's assertion (79-905 Pet. 3) that he "did not move for severance" does not preclude a second trial. The fact remains that Josiah requested a mistrial (*id.* at 7). That was a request that petitioner Josiah's trial terminate. Significantly, when the trial court said that it was granting a "mistrial or a severance" and that the Barnes trial would continue, petitioner Josiah did not state that he preferred to remain on trial with Barnes.[3] In any event, even if no request for a mistrial had been made, the judge would have been justified in ending the trial with respect to petitioners in light of the severe

[3]Contrary to petitioner Josiah's assertion (79-905 Pet. 16), the trial court did consider other alternatives, *i.e.* cautionary instructions to the jury, but concluded that they were not adequate (79-916 Pet. 8).

Bruton problem that had developed. *Arizona* v. *Washington*, *supra*, 434 U.S. at 509-510; *Illinois* v. *Somerville*, *supra*, 410 U.S. at 464.

Finally, we recognize that the Double Jeopardy Clause protects a defendant "against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *United States* v. *Dinitz*, *supra*, 424 U.S. at 611. However, nothing in this record suggests conduct by the prosecutor intended to provoke a mistrial "so as to afford the prosecution a more favorable opportunity to convict" the petitioners. *Downum* v. *United States*, 372 U.S. 734, 736 (1963). To the contrary, the prosecutor tried to avoid *Bruton* problems by instructing his witnesses not to mention the names of other defendants when testifying about admissions, and also suggested that this admonition should be repeated by the court (79-916 Pet. App. D2). Indeed, the witness in question never did mention the names of either petitioner when he related the statement of Elmo Barnes. While his reference to the "three other defendants" did create a *Bruton* problem, nothing in the record suggests that this problem should be chargeable to the prosecutor. To the contrary, the prosecution instructed the witness to refer to the defendants merely as "friends" of Elmo Barnes (79-905 Pet. 6). There was no overreaching on the part of the prosecutor. Accordingly, there is no double jeopardy bar to retrial. See *Moroyoqui* v. *United States*, 570 F. 2d 862 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978).[4]

[4]Petitioner Josiah's reliance (79-905 Pet. 18) on *United States* v. *Martin*, 561 F. 2d 135, 140 (8th Cir. 1977), is misplaced. In *Martin* the prosecutor read to the jury irrelevant and prejudicial testimony from a grand jury transcript in contravention of the court's order. The court of appeals described his actions as prosecutorial

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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overreaching "undertaken to harass or prejudice the defendant" and prohibited reprosecution following a mistrial. In the instant case, however, there is no basis on which to charge any impropriety to the prosecutor.